

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Docket
No.

76-1449

To be argued by:
Jeffrey C. Fisher

In The
United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

BS
Appellee,

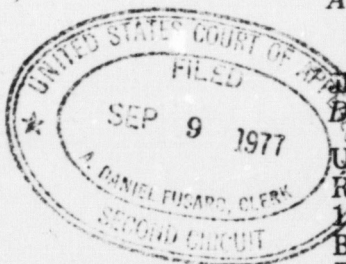
— v. —

CHARLES P. GREZO; JOSEPH T. D'AGOSTINO;
SAMUEL L. EBARE; RICHARD MICHAEL BEACH,
Defendants-Appellants.

On Appeal from the United States District Court
Northern District of New York

BRIEF OF THE UNITED STATES

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BRIEF OF THE UNITED STATES

ISSUES PRESENTED FOR REVIEW

- I. Was the evidence, when viewed in the light most favorable to the Government, sufficient to sustain the jury's verdict that the defendants Grezo, Ebare, D'Agostino and Beach were each conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business as charged in Count II of the indictment?
- II. Did the Trial Court correctly charge the jury on the definition of a conductor and on the defendant Grezo's alleged theory of defense?
- III. Was the evidence, when viewed in the light most favorable to the Government, sufficient to sustain the jury's verdict that the defendant D'Agostino used telephone facilities in interstate commerce to facilitate an illegal gambling business as charged in Counts III and V of the indictment?

STATEMENT OF THE CASE

Nature and Disposition of Case in Court below

On July 2, 1975, the United States Grand Jury for the Northern District of New York returned a five-count indictment against six defendants: Samuel L. Ebare, Joseph T. D'Agostino, Richard Michael Beach, Charles P. Grezo, Louis M. Camerano, and Raymond Czerwinski. Count I charged each of the six defendants with conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. 371, and named two unindicted co-conspirators, James V. Colloca and Leon Cook. Count II charged each of the six defendants substantively with conducting an illegal gambling business in violation of 18 U.S.C. 1955. Counts III, IV and V each charged the defendants D'Agostino, Camerano and Grezo with using an interstate facility to promote a gambling enterprise in violation of Sections 1952 and 2 of Title 18, United States Code.

The defendants' pretrial motions to suppress evidence obtained from the court-authorized electronic surveillance and from the execution of search warrants were denied on June 6, 1976 by the Honorable Lloyd F. MacMahon, Jr., United States District Judge, Southern District of New York, sitting by designation, and those rulings have not been contested on appeal.

On June 29, 1976, after approximately a one week jury trial before Judge MacMahon, all six defendants were convicted of the substantive offense of conducting an illegal gambling business (Count II). The defendants Ebare, D'Agostino and Czerwinski were also convicted of conspiracy (Count I), and the other three defendants were acquitted of that charge. The defendants D'Agostino and Camerano were each convicted under Counts III and V and acquitted on Count IV, and the defendant Grezo was acquitted on Counts III, IV and V.

Judge MacMahon sentenced the defendants on September 17, 1976 and December 9, 1976 as follows: Ebare and Beach each to serve a term of one year and one day and Ebare to pay a

\$5,000 fine; D'Agostino and Grezo each to serve a term of six months and pay a \$5,000 fine; Camerano and Czerwinski to be placed on probation with no fine. The defendants Grezo, Ebare, D'Agostino and Beach appeal their convictions, generally on grounds of alleged insufficiency of evidence, and Grezo additionally raises objections to Judge MacMahon's charge. The remaining two defendants - Camerano and Czerwinski - have not appealed their convictions.

Statement of Facts

Since the statement of facts in the appellants' briefs are extremely cursory, omitting discussion of significant parts of the Government's evidence, this brief presents a complete but concise summary of all relevant evidence in the record, particularly with respect to the role of each conductor in the gambling business.

In the winter of 1974, United States District Judge Edmund Port authorized the interception of wire communications, pursuant to the Government's application under 18 U.S.C. 2510 *et seq.*, at two Syracuse-area telephones: (315) 455-7153, the home telephone of the defendant D'Agostino, and (315) 479-7010, the telephone used by the defendant Ebare. At trial, the original tapes (Government's Exhibits 1 and 2), the composite tapes containing a set of selected relevant conversations to be played to the jury (Government's Exhibits 9-14) and a transcript corresponding to the composite tapes (Government's Exhibit 3) were admitted into evidence by stipulation [A324-A325].*

*Numbers preceded by the letter "A" refer to pages of the Appendix to this Brief. The Appendix consists of three bound volumes whose pages are numbered consecutively from A1 to A1024. The first two volumes contain a complete transcript of the proceedings below, and the third volume contains certain exhibits including Government's Exhibit 3, the composite transcript of wiretapped conversations.

The D'Agostino Book

The conversations intercepted over the defendant D'Agostino's home telephone established beyond dispute that he was operating a bookmaking business (hereinafter referred to as "the D'Agostino book") in violation of the New York State Penal Law [A662]. The Government's expert witness, F.B.I. Special Agent William Holmes, testified that the revenues of the D'Agostino book exceeded \$2,000 on numerous dates [A345, A355]; and he calculated the revenues for a single day, January 4, 1975, to be \$13,985 [A342-A345], as detailed in Government's Exhibit 17 [A1023]. Mr. Holmes identified D'Agostino's role as follows:

The individual identified in the transcripts as D'Agostino is at least a controller with responsibility of dispensing line information, bottom figures. He accepts wagers from writers and bettors. He regulates collections and payoffs to customers [A348].

Ebare's Management Position

Special Agent Holmes testified that based upon the intercepted conversations,

The individual identified in the transcripts as Sam Ebare is an owner, or a manager of this gambling business, inasmuch as he has the authority to make policy decisions regarding the operation of the business. He also settles disputes between the bettors and writers and he also finances the organization [A346].

Holmes' opinion is clearly supported by the taped conversations and the testimony of independent witnesses, as summarized below.

James Keller, a Syracuse resident, testified that in 1974 and 1975 he had been betting regularly and heavily with the (non-appealing) defendant Raymond Czerwinski, who was known to him as "Baldy" [A155-A156]. (Czerwinski was a writer/employee for the D'Agostino book [A350-A351].) Keller said that in January of 1975, he owed \$1,600 in gambling debts and

asked Czerwinski if he (Keller) could see "Sam" about paying it off over a period of time [A160-A161]. Czerwinski initially discouraged Keller from such a meeting and stalled him, but Keller ultimately did meet with the defendants Ebare and Beach in January of 1975, and Ebare instructed Keller at that time to take the matter up with Czerwinski [A162]. Keller testified:

The only thing he (Ebare) said was if I had won, he would have paid me right then, and he wanted to know why I couldn't pay him right then . . . he said that I should pay Baldy or Czerwinski [A258].*

Keller's testimony was corroborated by a series of monitored phone conversations between D'Agostino and Czerwinski, in which Czerwinski explained to D'Agostino that "Jimmy Keller", a betting customer, wanted to see "Sam" to pay off his \$1600 gambling debt on a time basis and still continue to place wagers [A960]. D'Agostino instructed Czerwinski to make excuses and put Keller off, but Czerwinski told D'Agostino that Keller was persisting in his request to see "Sam" [A961, A967, A968]. Finally Czerwinski told D'Agostino that he (Czerwinski) would have to have the money to pay off their other customers, and that Keller wanted to make a deal with Ebare, to which D'Agostino angrily responded, "Yea, he's (Keller's) liable to get a punch in the mouth, that's what's liable to happen to him [A987-A988]." These conversations, together with the Keller-Ebare-Beach meeting,

*This particular statement was read at trial from Keller's Grand Jury testimony and was immediately thereafter adopted by Keller as accurate [A259-A260]. This Grand Jury statement was admissible substantively under Rule 801(d)(1) of the Federal Rules of Evidence, since a foundation for it as a prior inconsistent statement had been laid [A259]. The record demonstrated that Keller was a highly reluctant witness, whose memory had to be constantly "refreshed" by his Grand Jury testimony.

demonstrated to the jury a hierarchal relationship with Ebare as boss of the D'Agostino book of which Czerwinski was an employee/writer. When the customer Keller wished to go to the top and settle with Ebare, D'Agostino and Czerwinski attempted to discourage him, presumably on instructions from Ebare, who would naturally have wanted to insulate himself from the low-level bettors. Ebare implicated himself in a managing role by expressing his disappointment that Keller had not paid Czerwinski, by directing Keller to see Czerwinski about it, and by telling Keller that if he had won the bets, he would have paid off.

James V. Colloca of Oswego, New York, an unindicted co-conspirator, testified that in mid-1974 he entered into an arrangement with Ebare for him, Colloca, to telephone his betting action to the D'Agostino book [A67-A72]. Colloca testified that he thereafter accepted wagers from his customers and passed them along by telephone to D'Agostino [A81] or to Beach [A82], and that Beach and others would make collections at his Oswego dry-cleaning shop [A79]. Colloca added that he, not his bettors, was responsible to Ebare for these wagers [A86]. Colloca did not charge his customers a fee [A89] except for the standard 10% vigorish which was passed along to the D'Agostino book [A75-A77], but Colloca was promised a bonus by Ebare if there were profits at the end of the season [A81].

Colloca also testified to two meetings with Ebare regarding collections. On one occasion at the Chart Room, Ebare personally collected from Colloca \$600 of gambling losses owed to the D'Agostino book [A83-A84]. On the second occasion, Ebare threatened to take a machine out of Colloca's dry cleaning shop if he did not pay \$1200 that he owed the D'Agostino book [A85-A86]. In addition, a physical surveillance placed Colloca, Ebare and D'Agostino together on October 22, 1974 [A327]; in another surveillance on October 30, 1974, Ebare was overheard discussing a debt with Colloca [A327-A328].

Additional evidence identifying Ebare as a conductor was introduced through the testimony of Lawrence Eppolito, who stated that he, as building superintendent of the James Crest Apartments, 1072 James Street, Syracuse, had rented Apartment C-4 to Ebare personally on December 24, 1974 [A135]; he added that only one set of keys was given out [A152]. Physical surveillances showed D'Agostino and Ebare together at that apartment building on January 2, 1975, and showed Ebare and Beach there on January 6, 1975 [A330]. Eppolito testified that after approximately one month's occupancy, Ebare vacated the premises and that he (Eppolito) turned over to the F.B.I. the abandoned property in the apartment, Government's Exhibit 4, which included a list of codes such as "76", "#24", "Bald", "Devel", "BB", "RK", "X-14", "X-12", and "X-6" [A1024]. These codes corresponded to codes used by customers or employees of the D'Agostino book: "76" [A355, A792], "24" [A835], "Devil" [A355, A767, A794, A833], "BB-60" [A355, A801, A845], "RK" [A852], "X-14" [A766], "X-12" [A847], and "X-6" [A779]. In addition, the code "bald" was clearly Baldy, the nickname of the defendant Czerwinski [A155]. This evidence, together with Eppolito's testimony and the physical surveillances raised the inference that this apartment was used by Ebare to conduct management-level meetings for the gambling business.

The items found in Ebare's automobile pursuant to the execution of the search warrant included a number of news sheets, line sheets and schedules of sporting events [A288-A290]. At that time Ebare had over \$1300 in cash on his person [A331].

Several recorded telephone conversations of Ebare also demonstrated his management-level role in the business. On January 6, 1975 at 12:00 noon, D'Agostino called Ebare and reported that he had to pay off \$612 to an unidentified person. Ebare asked D'Agostino if he had seen "Baldy" (referring to Czerwinski), and D'Agostino told Ebare that he had already given "it" to him. Ebare indicated that he did not have any

money with him, and D'Agostino suggested that he did not have to pay Czerwinski everything and added, "Well, it's up to you." Ebare inquired about D'Agostino's other collections, and they arranged to meet later [A1020]. Thus D'Agostino was reporting to his superior, Ebare, who confirmed his control over the D'Agostino book through their discussion of Czerwinski's status.

Other recorded calls involving Ebare were: D'Agostino's reporting to Ebare on an upcoming meeting with "Clyde" (Leon Clyde Cook), a self-admitted agent for the D'Agostino book [A1013], corroborated by an F.B.I. physical surveillance of that meeting [A329]; an unidentified male caller asking Ebare for money to pay \$800 owed to an unidentified third person, and making an arrangement for the payment [A1012], wherein the caller used the gambling term "dime", meaning \$1,000 [A341-A342]; Ebare discussing game results and mentioning the fact that "We need Pittsburgh" [A1015]; and Ebare's planning of meetings with D'Agostino and/or Beach [A1016, A1017, A1019, A1021, A1022].

In sum, Ebare's contention that the Government's proof "failed to substantially establish any connection on his part with the D'Agostino book" [Brief of Ebare, p. 3] is clearly baseless. The tapes, physical evidence, and testimony of witnesses placed Ebare solidly as the manager, owner, financier, and supervisor of the D'Agostino book and there was more than sufficient evidence from which the jury could have concluded that Ebare was a conductor.

Beach's Position as a Collector and Trusted Employee

Special Agent Holmes testified:

The individual identified in the transcript as Beach occupies the position of trust in this gambling organization inasmuch as he receives a bottom figure for an account, and he also . . . receives the amounts that are wagered on both teams in a single contest. This type of information is not normally given out unless it is to a trusted individual of the organization [A349].

The basis for Mr. Holmes' opinion was certain of Beach's telephone conversations. On several occasions D'Agostino furnished Beach with the "bottom figure" of the D'Agostino book; that is, the total amount of money having been wagered with D'Agostino on both sides of sporting events [A849, A859, A860, A861]. In one of these calls, January 12, 1975, D'Agostino gave Beach the bottom figure and then asked, "How do we stand there?" to which Beach replied, "just about (unintelligible) juice, all juice (meaning vigorish or profit)", and D'Agostino remarked, "we need Pittsburgh now [A860]." Special Agent Holmes pointed out that such information would only be given out to a trusted employee [A382]. A bookmaker's bottom figure or total revenue is highly sensitive information, and the jury was entitled to conclude, as did the Government's expert, that Beach would only have been given it for a particular purpose in conjunction with his function in the business; from this particular conversation, it was logical to infer that Beach was relaying to D'Agostino the status of another part of their business for the purpose of joining their information so that D'Agostino could determine what "we need" -- that is, to what extent their books were imbalanced in the overall operation.

In another call, Beach asked for and received the account balance of the customer R.K. [A852]; Special Agent Holmes testified that this indicated Beach was a collector for that account [A382], since in this instance Beach could not have been asking for his own bottom figure [A383].

In other calls, Beach asked for and received from D'Agostino the status of the business; for example,

Beach: How do those games stand?
 D'Agostino: They didn't. The people ain't got a chance to pay it yet. [A851]

* * *

Beach: ... How'd *we* (emphasis supplied) do today?
 D'Agostino: Well, not too good. [A853]

Similarly, on January 12, 1975, the following conversation was monitored:

D'Agostino: Hello
Beach: Harpo
D'Agostino: Yeah, my friend.
Beach: What's up buddy?
D'Agostino: Oh, not much.
Beach: How we stand here?
D'Agostino: Well, I gonna wait till 3 cause lot of them wanna wait till the last minute.
Beach: Um.
D'Agostino: I'll give it to ya right now though, so far, all right?
Beach: O.K.
D'Agostino: Uh, 3090 on Pittsburgh.
Beach: Right.
D'Agostino: And 3690 on Minnesota.
Beach: That ain't bad.
D'Agostino: No, but uh, we'll have quite a few more, but I told them I'd work till 3 today, cause a lot of them wanna wait till the last minute.
Beach: Good idea. What time does it start 3:30?
D'Agostino: Yeah.
Beach: O.K. Anything else?
D'Agostino: I can't hear ya.
Beach: Anything else?
D'Agostino: No
Beach: That's it. Any messages or anything?
D'Agostino: Nope. Everything is good.
Beach: O.K., buddy.
D'Agostino: Bye.
Beach: I'll, hey!
D'Agostino: Yea.
Beach: How you doing so far this week.
D'Agostino: Very good.
Beach: O.K.
D'Agostino: O.K. [A859]

The foregoing conversation is reproduced in full because it exemplifies Beach's access to management information and thus his management-level role. In it, Beach was told that the D'Agostino book would remain open until 3:00 for last-minute customers betting on a 3:30 game, Beach was told the bottom figure of 3090 and 3690 (indicating a closely balanced book),

and he was advised that there were no messages and that the book was doing very well that week.

Beach also telephoned the defendant Ebare on several occasions. On December 23, 1974, he asked Kathy Gell, Ebare's girlfriend, to tell Santa Claus (referring to Ebare) to "prv me up a little Christmas cash [A1014]." In another call, Ebare instructed Beach to get ahold of a kid on the South side [A1017], which the jury could infer was for a collection, and Beach shortly reported back to Ebare that he wasn't there [A1018]. On January 6, 1977, Beach called in to arrange a meeting with Ebare and another person [A1021] who turned out to be D'Agostino, according to the physical surveillance [A330]. In another conversation on arranging a meeting, Beach referred to Ebare as "General" [A1019].

The witness James Colloca*, an unindicted co-conspirator, testified that Beach made collections and sometimes ran the telephone for the D'Agostino book [A79, A82]. Beach was also present when Ebare had his collection "conversation" with the bettor James Keller [A162]; see pp. 4-6, *supra*.

Beach's telephone notebook, found on his person at the time of the search of January 20, 1975, connected him to various personnel in the organization. It had names of teams and numbers (the line) on one page [A301]. It contained the telephone number of unindicted co-conspirator Leon Cook [A538], the telephone number of the D'Agostino book [A538], a listing for "Eddy Miller," the code name which the defendant Louis Camerano used in giving the line to D'Agostino [A539], a listing for "Sam" followed by the defendant Ebare's home telephone number [A539], and the number of the Ebare telephone

*Both Beach and Ebare assail the credibility of the witness Colloca because he was immunized and was a convicted gambling felon. It is submitted that this issue was well-argued before the jury, brought out on cross-examination, and therefore a matter within the jury's discretion and not in issue here on appeal.

which was the subject of electronic surveillance [A539], all of which demonstrated Beach's connection to many persons who were an integral part of the D'Agostino book. At the time of the search Beach was holding under his coat sports journals and line sheets [A298-A299], and he was with the defendant Ebare who was carrying over \$1300 in cash [A331]. The logical inference was that Beach and Ebare were in the process of making collections for their gambling business.

In addition, Beach was surveilled by the F.B.I. on numerous occasions meeting with D'Agostino and/or Ebare [A326-A330].

Under Point I of his brief, the defendant Beach vigorously assails the Government expert's alleged inability to define Beach's role in the organization more precisely than that of a trusted employee [Brief of Beach, pp. 6-7]. Beach erroneously assumes that the Government's expert had "collate(d) the tape transcripts, testimony, and other evidence to connect the alleged participants into a proscribed gambling operation [Brief of Beach, p. 6]."

Quite to the contrary, in this case it was not the expert's function to analyze and render an opinion on all of the Government's evidence. Special Agent Holmes based his opinion solely upon his analysis of the taped conversations, and therein he found that Beach was frequently receiving sensitive information, such as the bottom figures for the D'Agostino book, which would only have been given to a person employed by the business in a position of trust. It was the jury who combined that opinion with the testimony of the witnesses and the physical evidence, to ultimately determine that Beach was a conductor.

In short, the jury's verdict was well-founded in the evidence, which showed Beach to be at least a collector, and in addition showed him to be a trusted functionary who arranged meetings, passed messages to and from Ebare and D'Agostino and other persons, and manned the bookmaking telephone when needed.

Grezo's Postition as a Layoff Bookmaker and Advisor

Special Agent Holmes testified:

The individual identified in the transcript as Charles Grezo occupies a role of receiving line information, placing lay-off wagers, makes line changes and also gives advice to D'Agostino on some line changes [A349-A350].

The electronic surveillance evidence showed that Grezo telephoned D'Agostino thirty-nine times between December 21, 1974 and January 13, 1975 [A870-A950], and he placed many of the calls long distance from coin telephones [A887, A894, A900, A911, A927, A931, A938, A940, A948, A950]. On a regular and ongoing basis, D'Agostino supplied Grezo with the current line information for a large number of sporting events [A870-A872, A880-A881, A885-A888, A893, A897-A898, A905, A911, A921, A925-A926, A929, A932-A933, A937-A938, A945-A946, A948-A949]. In return, Grezo regularly placed layoff wagers with D'Agostino, often in great quantities [A873-A877, A882, A884, A887, A889, A896, A899-A900, A906, A908-A909, A913-A916, A917, A922, A923, A924, A927, A931, A934, A935, A939-A942, A944, A947, A950]. Grezo was the only customer of D'Agostino who was allowed to place his wagers on a "split-line" basis -- that is, placing two wagers on the same team using two different lines, one-half point apart from each other [A344]. This preferential treatment was given to Grezo presumably to encourage him to lay off large amounts of wagering action to the D'Agostino book, and in fact Grezo was D'Agostino's biggest customer.

Special Agent Holmes pointed out several of Grezo's conversations which were typical of bookmakers as opposed to mere bettors. In one such conversation [A889] Grezo told D'Agostino, "I'm loaded" on a game, and Grezo asked for "three each," meaning that Grezo needed to lay off \$300 because he had taken in too much wagering on it. D'Agostino reluctantly accommodated him, but warned him, "scratch it off your sheet," meaning that D'Agostino would not accept any more layoff on that team [A491-A492].

Special Agent Holmes also pointed out two Grezo/D'Agostino conversations regarding a Notre Dame game [A492]. Grezo stated, "I'm getting all on Notre Dame," meaning that all of his customers were betting on Notre Dame, and therefore Grezo layed off a Notre Dame bet to D'Agostino [A906]. About twenty minutes later, Grezo asked D'Agostino to accept an additional \$100 layoff bet on Notre Dame because he was "jammed," meaning that he had taken too much wagering on that team. D'Agostino complained that he was "jammed" too, but agreed to accept a \$50 layoff bet [A908]. In a follow-up conversation that evening, Grezo and D'Agostino lamented that Notre Dame had won the game, and Grezo complained about the line, saying, "Everybody had it (Notre Dame) with me," meaning that a poor line had induced all of Grezo's customers to bet on Notre Dame [A910]. Special Agent Holmes pointed to another call, in which Grezo was laying off \$100 on Golden State to D'Agostino, in addition to what he had previously layed off on that team, because "they're all bettin the same games here," meaning that all of Grezo's customers were betting Golden State [A492, A917].

There were numerous other Grezo conversations typical of a bookmaker. For example Grezo's urging, D'Agostino agreed to cancel one bet and increase the layoff on two other teams at the last minute, indicating that Grezo was overloaded and needed help to balance his book [A944]. In another call, Grezo and D'Agostino discussed a problem with the Milwaukee line, Grezo placed a \$200 layoff wager and then said he was going to "take it off," meaning take it off his board and no longer accept bets on it [A882]. On another occasion Grezo placed a few wagers with D'Agostino and then said he had to go out and "get business now [A922]"; later that day, Grezo said, "I'm getting you business . . . I'm out hustling [A924]." Grezo made other comments typical of bookmakers, such as "I got a lotta business [A908]" and "I wanna get rid of it (lay-off action) [A907]." In one conversation they dickered over the line for a particular game and Grezo stated that he would

not bet the game at a line of 10-1/2, which D'Agostino wanted, because "I ain't got no (business at) 10-1/2 [A888]." In another conversation Grezo stated to D'Agostino, "I got a lot of baskets (basketball wagers) here, but I got to call you back [A934]," indicating that he needed to finish accepting wagers from his own customers before he would decide how much to lay off to the D'Agostino book.

In addition, Grezo and D'Agostino regularly discussed problems with the line, and made adjustments to it, as is typical between bookmakers. In these conversations, they would compare D'Agostino's line with that of another source [A892-A894], they would share complaints about the line [A874, A895], and Grezo would give D'Agostino advice about a particular line [A882-A883, A922]. Moreover, D'Agostino trusted Grezo enough to talk about the source of his own line [A885-A886, A903], and in one instance, D'Agostino even discussed with Grezo a problem he had with one of his customers or employees who had shifted the line with disastrous results for the book [A876].

The Grezo-D'Agostino conversations also showed that the D'Agostino book was dependent upon Grezo's layoff business, and D'Agostino himself took bookmaking advice from Grezo. On several occasions D'Agostino indicated a desire to take Grezo's wagering action [A873, A874, A884, A894, A895-A896, A900, A923], and on other occasions Grezo offered more layoff than the D'Agostino book could handle [A877, A880, A908]. On one day Grezo was late in calling and D'Agostino told him that he was "getting very worried" when he (Grezo) hadn't called in his wagers, to which Grezo replied, "I got a zillion games don't worry [A939]."

D'Agostino discussed law-enforcement problems with Grezo on occasion: They complained about the "heat" (police) [A918-A919]; D'Agostino asked Grezo to check his bottom figure so that he (D'Agostino) could destroy his paperwork, obviously to avoid being caught by police with it [A946];

and D'Agostino discussed with Grezo how he had been stopped and frisked by local police [A892-A893]. These conversations were indicative of two bookmakers talking, because a bettor would not have been particularly concerned with D'Agostino's police problems and indeed, D'Agostino would not have wanted to frighten bettors by discussing such affairs with them.

In yet another conversation demonstrating D'Agostino's reliance upon and confidence in Grezo, D'Agostino asked Grezo for advice about what would happen if the names of the teams, North-South or East-West, were confused in betting. Grezo replied that all bets would have to be nullified [A906-A907]. Thus, Grezo gave advice to D'Agostino on the conduct of the book. This conversation not only indicated that Grezo was a bookmaker, as opposed to a bettor, but it showed D'Agostino's dependence on him as well.

In Point I of his Brief, the defendant Grezo claims that the evidence was insufficient to prove that he was a bookmaker as opposed to a mere bettor. However he does concede, as he must, that at least some of the conversations were indicative of layoff betting [Brief of Grezo, p. 30]. Grezo apparently claims that most of his wagering was person~~al~~, and that he was engaged in a scheme to "play the middle" -- that is, to wager both sides of the same sporting event with two different bookmakers using two different lines, in hopes of winning both bets.

Grezo's playing the middle argument must fail on two grounds. First, there is nothing in the record to show that he was betting with any other bookmakers. At trial, Grezo's attorney cross-examined Special Agent Holmes with hypotheticals of playing the middle [A497], but there was no evidence introduced that Grezo actually did so, despite the fact that he said in his opening statement that he would introduce such evidence [A39]. Consequently, the jury had no basis in the record to conclude that Grezo was playing the middle. Second, playing the middle would not have constituted a defense in any event; Special Agent Holmes testified that both layoff bookmakers

and bettors play the middle [A497] and therefore this sort of conduct would not have identified Grezo as a bettor.

In short, Grezo's own telephone conversations with D'Agostino established that he was a layoff bookmaker by demonstrating: (1) that Grezo received the line information from D'Agostino on a frequent basis; (2) that D'Agostino accepted Grezo's wagers in large quantities and amounts under a unique "split line" arrangement; (3) that Grezo frequently made statements characteristic of a bookmaker to D'Agostino; (4) that D'Agostino and Grezo were constantly sharing advice, opinions, and remarks which typified conversations between bookmakers; and (5) that D'Agostino trusted Grezo and depended upon his advice and his business in a manner characteristic of layoff bookmaking.

Czerwinski's Position as a Writer

Special Agent Holmes testified,

The individual identified in the transcript as Raymond Czerwinski or Baldy is at least a writer who receives line information from D'Agostino, relays wagers to D'Agostino, seeks assistance from D'Agostino regarding disputes between a bettor and himself, and he also makes collections [A350-A351].

The taped conversations showed that Czerwinski telephoned wagers to D'Agostino in a variety of games and on a substantial and continuing basis [A952, A953, A954, A966-A967, A972, A973, A977, A979, A984, A991, A995, A996, A997, A1003, A1008, A1009, A1010, A1011]. He discussed problems with and took instructions from D'Agostino demonstrating an employment relationship [A952, A953, A959-A962, A963-A965, A966-A968, A969, A970, A973-A974, A980, A982, A983, A984-A985, A986-A989, A990, A991-A992, A993, A997-A998, A999-A1002, A1003-A1004, A1005-A1006, A1007, A1009, A1011]. Indeed, the fact that Czerwinski was a conductor of the D'Agostino book was not contested at trial and is not raised on appeal.

Camerano's Position as Source of Line

Special Agent Holmes testified,

The individual identified in the transcript as Camerano is the line source for this organization. He supplies the line in order for the organization to accept wagers [352].

The tapes showed that Camerano provided the line to the D'Agostino book on a regular and continuing basis commencing January 4, 1975.

Prior to January 4, 1975, D'Agostino was experiencing various problems with the line, including the lack of dependability of the line source, the lack of accuracy of the line which required shifting the line, and the failure of the line source to supply a line for all of the games needed by the D'Agostino book. These difficulties were apparent in conversations between D'Agostino and Grezo prior to Camerano taking over [A874, A878, A881, A882-A883, A885-A886, A902]. In one such conversation D'Agostino complained about his source's inadequate line, and then happily advised Grezo, "January 4th the other guy starts [A885]."

On January 4, 1975, at 12:28 p.m., D'Agostino received the line from Camerano by long distance, and at the close of the conversation D'Agostino agreed to call Camerano back at 2:00 (Camerano's time) at the Flamingo [A862-A863]. Special Agent James Supan testified that at 2:00 Las Vegas time, that afternoon, he observed Camerano answer a page at the Flamingo Hotel in Las Vegas for "Eddie Miller", and overheard him state certain line information, and then say, "All right, 9:30 455-7153 (which is the number of the D'Agostino book) [A166-A167]." At the same time, D'Agostino was observed by the F.B.I. at a luncheonette in Syracuse, where he disappeared from the agent's view into a corner where there was a pay telephone [A330]. On January 5, 1975, Camerano was observed going to Churchill Downs in Las Vegas and then at approximately 9:30 a.m. he went to a pay telephone in the Dunes Hotel where he placed a call, read the line information, and said, "The other place tomorrow

at 2 o'clock [A210-A211]." The toll record [A326] confirmed that that call went to the D'Agostino book, and of course the conversation was monitored at the Syracuse end during the ongoing wiretap [A864]. Special Agent William Scobie testified that he observed Camerano ~~over~~ a page for Eddie Miller on January 6, 1975 at the Flamingo, and overheard him furnish the line [A223]. Also on January 11 and January 12, 1975, Camerano's furnishing the line to D'Agostino was monitored on the wiretap of the D'Agostino book [A865, A866].

The furtive manner in which Camerano called the line into the D'Agostino book, using different telephones on different days at both ends of the line, indicated an elaborate plan to avoid law-enforcement detection. This plan was successful to the extent that some of the Camerano calls were obviously not placed to D'Agostino's bookmaking telephone. However, the jury inferred a consistent and ongoing relationship from the pattern of calls which were recorded or overheard, from their evasive actions, and from the fact that D'Agostino anxiously awaited and did in fact use Camerano's line as an essential part of the book.

The dependence of the D'Agostino book upon Camerano's line was obvious when, on January 4, 1975, D'Agostino received ten calls from customers, anxiously requesting the line [A743-A752]. D'Agostino had not yet received the line from Camerano, and so rather than make up a line, give out a newspaper line, or in any way attempt to satisfy those customers, he merely told them to call back later. When they did, he disseminated Camerano's line [A755-A773]. In other words, the D'Agostino book was at a complete standstill until the Camerano line came in. Once it did come in, the book disseminated it, and accepted wagers on it. Thereafter D'Agostino maintained this pattern of refusing to open for business without the line [A916, A918, A942], except on one occasion when D'Agostino made up his own line; even then as a precaution he reduced Grezo's betting limit until the Camerano line came in, one-half hour later [A945].

Special Agent Holmes stated that Camerano's line was necessary to the operation of the D'Agostino book [A353]. Holmes described the Churchill Downs Sports Book in Las Vegas (from which Camerano obtained the line) as an up-to-date, constantly adjusted bookmaker's line which reflected current betting trends nationwide [A352-A353]. This line was a highly valuable and necessary asset to the D'Agostino book, as shown in a January 4, 1975 conversation between D'Agostino and Grezo. Grezo complained about the lateness in receiving the line, and D'Agostino said, "I talked to the guy (Camerano) yesterday, at 12:30, I'd be the first one (to receive the line) . . . they don't open there (until 9:30 Las Vegas time) [A903]." This indicated that D'Agostino had arranged to obtain the fresh sports line from Camerano as soon as Churchill Downs opened in Las Vegas.

The Positions of Colloca and Cook as Agents or Writers

The conspiracy count of the indictment named two unindicted co-conspirators, James Colloca and Leon Cook, both of whom testified under immunity as Government witnesses.

The testimony of Mr. Colloca is summarized at p. 6, *supra*, in connection with the defendant Ebare's activities. In essence, Colloca admitted that he was an agent or writer for the D'Agostino book; he accepted wagers from his customers, passed them on to D'Agostino or Beach, and was responsible for settling up with his customers.

The role of Leon Cook was essentially the same as that of Colloca. Cook testified that he accepted wagers from bettors, distributed D'Agostino's line to them, and they settled up with him (Cook) [A311-A313]. On one occasion Cook took possession of an automobile belonging to a bettor named Ross Fagan in satisfaction of his gambling debt to the D'Agostino book, and D'Agostino was aware that Cook was collecting in this manner [A313-A315]. Cook also stated that in the fall of 1974, he permitted D'Agostino to use his home telephone in connection with the operation of the book [A309-A311].

Special Agent Holmes testified that at least eight other persons, designated only by their code names -- 76, Adella, Dennie, Lefty, BB-60, 24, VL, and Devil were at least writers for the book [A354-A355].

ARGUMENT

POINT I

THE EVIDENCE WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT THAT THE DEFENDANTS GREZO, EBARE, D'AGOSTINO AND BEACH WERE EACH CONDUCTING, FINANCING, MANAGING, SUPERVISING, OR OWNING ALL OR PART OF AN ILLEGAL GAMBLING BUSINESS.

Three of the appellants -- Grezo, Beach and Ebare -- claim that they did not conduct, finance, manage, supervise, direct or own all or part of the D'Agostino book, within the meaning of Section 1955 of Title 18, United States Code. They also claim, together with the appellant D'Agostino, that the Government failed to establish the requisite involvement of five or more persons in such capacities.* None of the appellants claims a failure of proof as to the other two jurisdictional requisites of an illegal gambling business: violating state law, and operating in excess of thirty days or having revenues of \$2,000 in any single day; indeed, those are conceded outright by D'Agostino and Ebare [Brief of D'Agostino, p. 2; Brief of Ebare, p. 2].

*The defendants Ebare and D'Agostino do not specifically attack their convictions under Count I for conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. 371, and therefore the Government contends that their conspiracy convictions should be affirmed irrespective of this Court's decision on the substantive count; *United States v. Fiorella*, 468 F.2d 688 (2nd Cir. 1972), *cert. den.* 417 U.S. 917 (1974).

At the outset, it is essential to restate the well-established interpretation of the statutory term "conductor." This Court analyzed the relevant legislative history in *United States v. Becker*, 461 F.2d 230 (2nd Cir. 1972), judgment vacated on other grounds 417 U.S. 903 (1974), and concluded at page 232:

Thus Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business.

The view that Congress intended to include as conductors everyone who participates in the operation of the business except betting customers has been taken in other circuits as well: *United States v. Smaldone*, 485 F.2d 1333, 1351 (10th Cir. 1973), cert. den. 416 U.S. 936 (1974); *United States v. Riehl*, 460 F.2d 454, 459 (3rd Cir. 1972); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974).

The evidence in this case established that Ebare was a manager, supervisor, financier and director, D'Agostino was the central manager, Beach was a collector and trusted employee, Grezo was a layoff bookmaker, Czerwinski was a writer, Camerano was the Las Vegas source of the line, and the unindicted co-conspirators Cook and Colloca, as well as others, were writers and agents of the D'Agostino book. As such, each of these persons functioned in the organization in a capacity greater than that of a mere bettor; consequently, each was a conductor of the D'Agostino book.

Grezo, a Layoff Bookmaker, was a Conductor.

The defendant Grezo contends in Point II of his brief that, assuming he was a layoff bookmaker to D'Agostino, he was still not a conductor of the D'Agostino book within the meaning of 18 U.S.C. 1955.

Contrary to Grezo's contention that this is a question of first impression, at least six circuits have adopted the position that a

layoff bettor or bookmaker is within the ambit of this statute: *United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976), *cert. den.* (1977); *United States v. Box*, 530 F.2d 1258, 1263 (5th Cir. 1976); *United States v. Voteller*, 544 F.2d 1355, 1359 (6th Cir. 1976); *United States v. McHale*, 495 F.2d 15, 18 (7th Cir. 1974); *United States v. Bohn*, 508 F.2d 1145, 1149 (8th Cir. 1975), *cert. den.* 421 U.S. 947 (1975); *United States v. Sacco*, 491 F.2d 995, 1002-3 (9th Cir. 1974).

For example, in *Bohn*, *supra*, the evidence against the defendant Bohn consisted of his receiving line information and placing layoff wagers with the central Kieve book on two consecutive days, and a bottom sheet and sports program were in his possession at the time of his arrest. Even this meager evidence was held by the Court to be "more than sufficient" to support the jury's guilty verdict under Section 1955 [*Id.* at 1149]. Certainly the Government's case against Grezo is far stronger than that which supported Bohn's conviction; in the instant case, Grezo exhibited a pattern of large scale wagering over an extended period of time, and had frequent discussions which were characteristic of bookmakers.

As another example, in *United States v. Turzitti*, 547 F.2d 1003, 1004-6 (7th Cir. 1977), *app. pendg.*, the Court affirmed an 18 U.S.C. 1955 conviction against the defendant Turzitti, who had simply received the line from and layed off wagers to the Smith book. The Court rejected Turzitti's claim that his wagers were not layoff wagers, and noted that this was simply a question of fact which the jury had decided against him [*Id.* at 1005, footnote 6].

Notwithstanding the well-established rule that a layoff bookmaker is a conductor, the defendant Grezo contends in his brief that an additional element of "interdependence" between the two bookmakers is part of the Government's burden of proof. The Government submits that while interdependence may indeed exist in some cases, it is not necessary to establish conducting under 18 U.S.C. 1955.

For example, *United States v. Guzek*, 527 F.2d 552, 555 (8th Cir. 1975), heavily relied upon by the defendant Grezo, supports the Government's position in this case. There, the Court affirmed the 18 U.S.C. 1955 conviction of two bookmakers who had each layed off wagers to the Fecht/Larson book. In its decision, the Court recognized the two separate fact patterns of these two bookmakers, and affirmed their convictions for two different reasons. As to the bookmaker-defendant Dietch, the Court noted a "consistent and ongoing relationship between two books in which one bookmaker (Fecht/Larson) regularly provided line information to the Dietch book and, in return, received bets from Dietch, including some layoff bets [*Id.* at 555]."

The relationship of the defendant Grezo to the D'Agostino book in the instant case strikingly resembles that of the defendant Dietch to the Fecht/Larson book in the *Guzek* case, and it is submitted that Grezo's conviction should be affirmed for the same reason -- the existence of a consistent and ongoing relationship of receiving line in exchange for layoff bets.

On the other hand, the *Guzek* Court recognized that such a consistent and ongoing relationship was not present with respect to the other bookmaker in that case, the defendant Guzek. Even though Guzek's wagering was only sporadic, his conviction was affirmed because a single conversation suggesting a general business arrangement between them was viewed by the Court as adequate substitute evidence of a consistent and ongoing relationship. Thus it is clear that the *Guzek* case does not require proof of interdependence before a layoff bookmaker could be considered a conductor. Reading *Guzek*, *supra* and *Bohn*, *supra* together, the position of the Eighth Circuit is that a bookmaker who receives the line and lays off wagers to another bookmaker on a regular and ongoing basis is a conductor of the latter's business; in the absence of direct evidence of such a regular and ongoing relationship, a particular conversation showing interdependence will suffice to render him a conductor.

Similarly, Grezo's reliance upon *United States v. Brick*, 502 F.2d 219, 224-225 (8th Cir. 1974), for his interdependence theory, is misplaced. In that case, three defendants -- Brick, Samuelson and Weinberg -- were agents for the Singer Book, and they had a 50% profit/loss sharing arrangement with it; however, two other defendants -- McCutcheon and Weidlick -- were simply bookmakers who layed off to the Singer Book and used its line without any profit-sharing agreement. The Court said at page 225:

Although defendants argue that they are independent businessmen, it is evident that the success of their individual operations was dependent upon the success of its various related components, e.g. on their ability to pool their bets with Singer (either through lay-offs or profit sharing agreements) and to share line information through him.

Thus, the *Brick* Court suggested that the connection necessary to establish conducting in that case was made *either* by the agents' profit sharing agreement, *or* by the independent bookmakers' laying off wagers to the Singer book. This latter fact situation is precisely that of the defendant Grezo in the instant case, and accordingly it is clear that Grezo was a conductor of the D'Agostino book by virtue of his using its line and laying off wagers to it in return.

Grezo also cites *United States v. Schaefer*, 510 F.2d 1037 (8th Cir. 1975), *cert. den.* 421 U.S. 978 (1975) to support his interdependence theory. However, the facts of that case do not clearly indicate whether there was an actual exchange of profits and exchange of layoff bets between the bookmakers. There, the Court merely held that while the evidence of layoff betting was not as strong with two of the defendants as with the others, such conduct could be inferred from the substance of the conversations themselves. Similarly, in *United States v. Thomas*, 508 F.2d 1200 (8th Cir. 1974), *cert. den.* 421 U.S. 947 (1975), cited by the defendant Grezo, there may have been some layoff going back and forth between the two bookmakers, but the Court did not state that an *exchange* of layoff was necessary in order to be a conductor.

In sum, an additional element of direct proof of interdependence is not required to show that a bookmaker who regularly receives the line and places layoff bets is a conductor. Congress intended and the Courts have recognized that layoff betting is in and of itself a major vehicle for connecting otherwise independent gambling organizations, and therefore they have not required specific evidence of interdependence; *Schaefer, supra* at p. 1311.

Moreover, Grezo's conversations in this case demonstrated a much closer relationship to D'Agostino than simply receiving the line and laying off bets. As detailed in the facts, *supra* pp. 13-17, Grezo gave bookmaking advice to D'Agostino, they constantly discussed bookmaking problems, and the D'Agostino book depended upon Grezo's big layoff business. Consequently, in this case there was evidence of mutual dependence, even though it was not needed as part of the Government's proof.

Camerano, as the Line Source, was a Conductor.

All four appellants herein claim that the defendant Camerano, who did not appeal his conviction, was not a conductor, and thus should not have been included among the five necessary to establish an illegal gambling business.

The evidence showed that Camerano joined the enterprise on January 4, 1975, and thereafter provided the line to the D'Agostino book from an up-to-date line posted at the Churchill Downs Sports Book in Las Vegas; he communicated the line through an evasive scheme in which Camerano and/or D'Agostino shifted to different telephones on different days, obviously as a result of extensive and deliberate pre-planning.

The defendants rely primarily on *United States v. Todaro*, 550 F.2d 1300 (2nd Cir. 1977) to support their argument. The Government submits that *Todaro* must be limited to its own facts, and is distinguishable from the instant case in several ways. In *Todaro*, the jury convicted a single defendant under

Section 1955 after hearing the immunized testimony of his superiors in the gambling operation, who had already been convicted under the same section. The tone of the opinion indicated this Court's concern that this statute, which was designed to prohibit large scale gambling enterprises, was being brought to bear too heavily upon a relatively minor figure simply because he invoked his right to a trial. Significantly, the Court noted at page 1302:

Only Todaro was on trial and his role was so insignificant that even giving exaggerated importance to his participation cannot elevate him beyond that of a comparative outsider supplying *one of the sources* of information *possibly used* by the Castellanis (emphasis supplied).

The *Todaro* Court emphasized that each case had to be resolved on its own facts, reversed Todaro's conviction, and dismissed the indictment against him.

The primary distinction between the positions of Todaro and Camerano is obvious. Camerano was convicted for performing an indispensable function for a large gambling enterprise of the type Congress intended to prohibit in Section 1955. Camerano was not "one of the sources" of the line - he was *the only source* of the line, and the operation was completely at a standstill until his line came in to D'Agostino. Camerano's line was not "possibly used," it was *in fact used* and given out to every customer who called the D'Agostino book. The line came directly from Churchill Downs, and reflected immediate nationwide bookmaking trends; as such, it was a reliable line which gave stability of betting and thus profitability to the D'Agostino book. Moreover, the defendant Beach had Camerano's code name "Eddy Miller" and telephone number in his address book, indicating that he was responsible for securing the line when D'Agostino was unable to do so.

In short, Camerano, unlike Todaro, was a necessary element to the success of the bookmaking business. The D'Agostino book could not have operated without Camerano's line. The fact that Camerano joined somewhat late does not bar him from

being a conductor, because it is well-established that the Government need not prove that each individual conductor generate \$2,000 of revenue or be in the operation for 30 days; *United States v. Marrifield*, 515 F.2d 877, 880-881 (5th Cir. 1975), *cert. den.* 423 U.S. 1021 (1975); *United States v. Smaldone*, 485 F.2d 1333, 1351 (10th Cir. 1973), *cert. den.* 416 U.S. 936 (1974).

Similarly, in *United States v. DiMuro*, 540 F.2d 503, 507-508 (1st Cir. 1976), *cert. den.* (1977), the Section 1955 convictions of defendants Colangelo, DiMuro and Mantica were affirmed, where their connection to the Santarpio (central) book was basically to supply the line and race results. The Court said: "The exchange of line and other gambling information are necessary and useful functions in a gambling enterprise and persons who carry out such functions have been held to be engaged in an 'illegal gambling business' [*Id.* at 508]."

Consequently, the jury had sufficient evidence upon which to determine that the defendant Camerano was a conductor of the D'Agostino book.

Cook and Colloca, as Writers and Agents, were Conductors

In addition to the six defendants, the Government submitted proof that the immunized witnesses Leon Cook and James Colloca were also conductors of the D'Agostino book. They were lower-echelon agents who distributed line to, received wagers from, and collected from their own customers. All such wagering was passed along to the D'Agostino book which provided the line. As such, Cook and Colloca were agents and writers of the business, and therefore conductors.

Their positions were the same as that of the defendant Ganem in *United States v. Joseph*, 519 F.2d 1068, 1071 (5th Cir. 1975), *cert. den.* 424 U.S. 909 (1976), where the Court said at page 1071:

Ganem was an associate of the bookmakers, passing on to them bets and acting as one of their disbursement agents. Agents, such as he, must be counted in deciding

whether at least five persons are conducting a gambling business.

A similar conclusion was reached in *United States v. Sacco*, 491 F.2d 995, 1002-1003 (9th Cir. 1974), where the convictions of "splitters" -- agents who serviced certain customers in a fee percentage arrangement with the Sacco book -- were affirmed. In *United States v. Becker*, 461 F.2d 230, 232 (2nd Cir. 1972), *judgment vacated on other grounds* 417 U.S. 903 (1974), agents or runners were also held to be conductors of an illegal gambling business.

POINT II

THE TRIAL COURT CORRECTLY CHARGED THE JURY ON THE DEFINITION OF A CONDUCTOR AND ON THE DEFENDANT GREZO'S ALLEGED THEORY OF DEFENSE.

The defendant Grezo objects to the Court's refusal to give two proposed charges to the jury. First, Grezo would have had the Court instruct the jury to the effect that a bookmaker who lays off to another bookmaker is not a conductor unless the receiving bookmaker also lays off bets to the first bookmaker; in other words, the laying off must be made in *both* directions [Brief of Appellant Grezo, pp. 38-40].

Such a charge is not consistent with the law. As set forth in more detail in Point I *supra*, pp. 21-29, every circuit which has had occasion to pass upon the issue has held that a bookmaker who regularly lays off action to and receives the line from the central bookmaker is a conductor. See for example, *United States v. Turzitti*, 547 F.2d 1003, 1004-1006 (7th Cir. 1977), *app. png.* and *United States v. Bohn*, 508 F.2d 1145, 1149 (8th Cir. 1975), *cert. den.* 421 U.S. 947 (1975). Specific evidence of interdependence between two bookmakers is not required, and *United States v. Guzek*, 527 F.2d 552, 555 (8th Cir. 1975), does not hold otherwise. There, the Court affirmed the conviction of bookmaker Dietch, who simply received the

line from the Fecht/Larson book and layed off to it in a "consistent and ongoing relationship [*Id.* at 555]," just as the defendant Grezo did in the instant case.

In connection with the definition of a conductor in the instant case, Judge MacMahon gave the following charge:

The word 'conduct' means to carry on or to operate, or to cause to function, and refers to both high level bosses, and to street-level employees. It includes all levels of personnel who participate in an illegal gambling business, regardless of how minor their roles, and whether or not they are called writers, directors, runners, clerks, or employees. It includes agents or middlemen who accept bets from others, and pass them along to a single, central gambling business. It includes otherwise outside bookmakers who accept bets from their own customers, and lay them off to a single central operation on a regular ongoing, consistent and substantial basis.

It does not include anyone, including an outside or independent bookmaker who places a single, or isolated bet for his own customer, or who makes isolated and casual, rather than substantial and regular lay-off bets, or who occasionally exchanges line information with the central gambling operation.

In short, a conductor includes all persons who participate in the operation of a gambling business, including those who participate in a network composed of other bookmakers, who join in a cooperative and consistent ongoing relationship with a single central gambling enterprise, and pool their bets, either through fairly regular layoffs, or profit sharings, or consistently and continually share line information, and systematically transfer a substantial amount of business, or part of the action, or give advice concerning gambling operations.

However, the bettor, player or customer of an illegal gambling business does not conduct the illegal gambling business, even though he engages in the illegal gambling activity by placing a bet or bets, and even though he may be a regular and even a daily customer of the gambling business, and notwithstanding the fact that he may play or bet large amounts of money.

The federal law is not aimed at the bettor, at the player or the customer, but at those who conduct the illegal gambling business [A716-A718].

This charge was fully consistent with the law and fair to the defense; it mentioned the necessity of a consistent ongoing relationship, it excluded bettors no matter how much wagering they placed, and it excluded bookmakers who had only a casual relationship with the business.

Second, the defendant Grezo objects to Judge MacMahon's refusal to give the jury a lengthy and somewhat rambling requested instruction [Brief of Appellant Grezo, pp. 40-42], which he calls his "theory of defense." In fact it is something of a mixture, parts of which are not the law, parts of which were stated in other portions of the charge, and parts of which were argumentative and therefore inappropriate as jury instructions.

Grezo's proposed charge contained nine paragraphs. The first and second paragraphs asserted that Grezo's defense was that he was a mere bettor or player. The next four paragraphs were a lengthy and somewhat repetitious explanation of the distinction between a bettor and a conductor.

Judge MacMahon gave the jury a detailed and accurate explanation of the term conductor as distinguished from player, as reproduced above, and also charged them as follows:

The defendant Grezo contends that he was simply obtaining line information in order to play the middle, and that he was a mere player. That issue is for you to decide [A725-A726].

This instruction, together with the lengthy explanation of a conductor, contained the essence of Grezo's request, and eliminated the unnecessary verbiage and argumentation. Moreover, the issue for the jury was a fairly simple one -- whether Grezo was a player or layoff bookmaker, and counsel for the defendant Grezo addressed it at length to the jury [A584-A618]. Grezo does not now claim, nor could he claim, that the jury

was not squarely faced with this issue by counsel and amply educated on it by the Court.

While it is true as a general rule that a defendant is entitled to an instruction on his theory of defense if there is evidence to support it, the court has discretion to reword or reframe the proposed instruction. In *United States v. Brown*, 540 F.2d 364, 380-381 (8th Cir. 1976), the Court held that the failure to give an instruction on the defendant's alleged lack of knowledge and intent in a Hobbs Act-extortion case was not error in the absence of a showing of prejudice. Moreover, a mere denial of guilt by a defendant has been held not to be a theory of defense of the sort which requires an explanatory charge; a theory of defense is a specific question of law and/or fact which is not obvious to the jury: *Laughlin v. United States*, 474 F.2d 444 (D.C. Cir. 1972), cert. den. 412 U.S. 941 (1973). The defendant Grezo's reliance upon *United States v. Alfonso-Perez*, 535 F.2d 1362 (2nd Cir. 1976) is misplaced; there, this Court reversed a conviction for three combined reasons: the trial court's failure to correctly charge on the statute of limitations issue, inappropriate prosecutorial comments, and a failure to charge the theory of defense. The Court indicated that the failure to charge the theory of defense would not alone have constituted reversible error.

The final three paragraphs of Grezo's proposed charge stated essentially that the jury must acquit if they believed that the facts were equally susceptible to two inferences -- that Grezo was a mere player or that he was a bookmaker. The United States Supreme Court has held that such a charge is confusing and incorrect, where the trial court has otherwise properly instructed the jury on reasonable doubt: *Holland v. United States*, 348 U.S. 121, 139-140 (1954). This circuit has consistently followed the *Holland* lead in *United States v. Siragusa*, 450 F.2d 592, 596 (2nd Cir. 1971), cert. den. 405 U.S. 974 (1972) and *United States v. Warren*, 453 F.2d 738, 745 (2nd Cir. 1972), cert. den. 406 U.S. 944 (1972).

In sum, Judge MacMahon's charge was complete, accurate and fair to all of the defendants and Grezo's proposed charges would have been confusing, contrary to the law, argumentative and/or unnecessary.

POINT III

THE EVIDENCE WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT THAT THE DEFENDANT D'AGOSTINO USED TELEPHONE FACILITIES IN INTERSTATE COMMERCE TO FACILITATE AN UNLAWFUL ACTIVITY, AS CHARGED IN COUNTS III AND V OF THE INDICTMENT.

In Point III of his brief, the defendant D'Agostino challenges the sufficiency of evidence with respect to Counts III, IV* and V of the indictment. Each of these counts charged him with violating 18 U.S.C. 1952 in connection with specific interstate telephone calls in which he received the line information from the non-appealing defendant Camerano. D'Agostino argues that the evidence was insufficient because: (1) the proof did not establish Camerano's knowledge that the line information was going to be used in an unlawful activity; and (2) the proof did not show that Camerano's line information was used by D'Agostino in his gambling operation.

The elements of a violation under 18 U.S.C. 1952 are set forth in *United States v. Gebhart*, 441 F.2d 1261 (6th Cir. 1971), *cert. den.* 404 U.S. 855 (1971), at page 1263: (1) that the accused voluntarily used the facilities of interstate commerce; (2) that he attempted to or did in fact promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any one of certain statu-

*Since D'Agostino was acquitted under Count IV, the Government is at a loss to understand why he challenges the sufficiency of the evidence on that count.

torily defined activities; and (3) that the accused formed a specific intent to promote, manage, establish, carry on or facilitate one of the prohibited activities.

As one can see, contrary to D'Agostino's first claim, the Government is not required to prove that a defendant had knowledge of the use to which the information would be put; it is only necessary to show that the accused intended to facilitate the gambling activity. A similar pattern of conduct involving the relaying of line information from the Las Vegas sports book to Indianapolis was sufficient to support a conviction under this statute in *United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974).

Moreover, the defendant D'Agostino has no standing to complain that the non-appealing defendant Camerano did not possess the requisite intent. If the defendant *D'Agostino* used an interstate facility with the intent to promote his gambling operation, then he is culpable under 18 U.S.C. 1952, irrespective of whether the man at the other end of the line, Camerano, was also guilty.

D'Agostino's second contention -- that Camerano's line was not used in his operation -- must also fail. The record is replete with evidence that D'Agostino not only used, but in fact depended upon the Camerano line information, as noted by Special Agent Holmes [A352-A353].

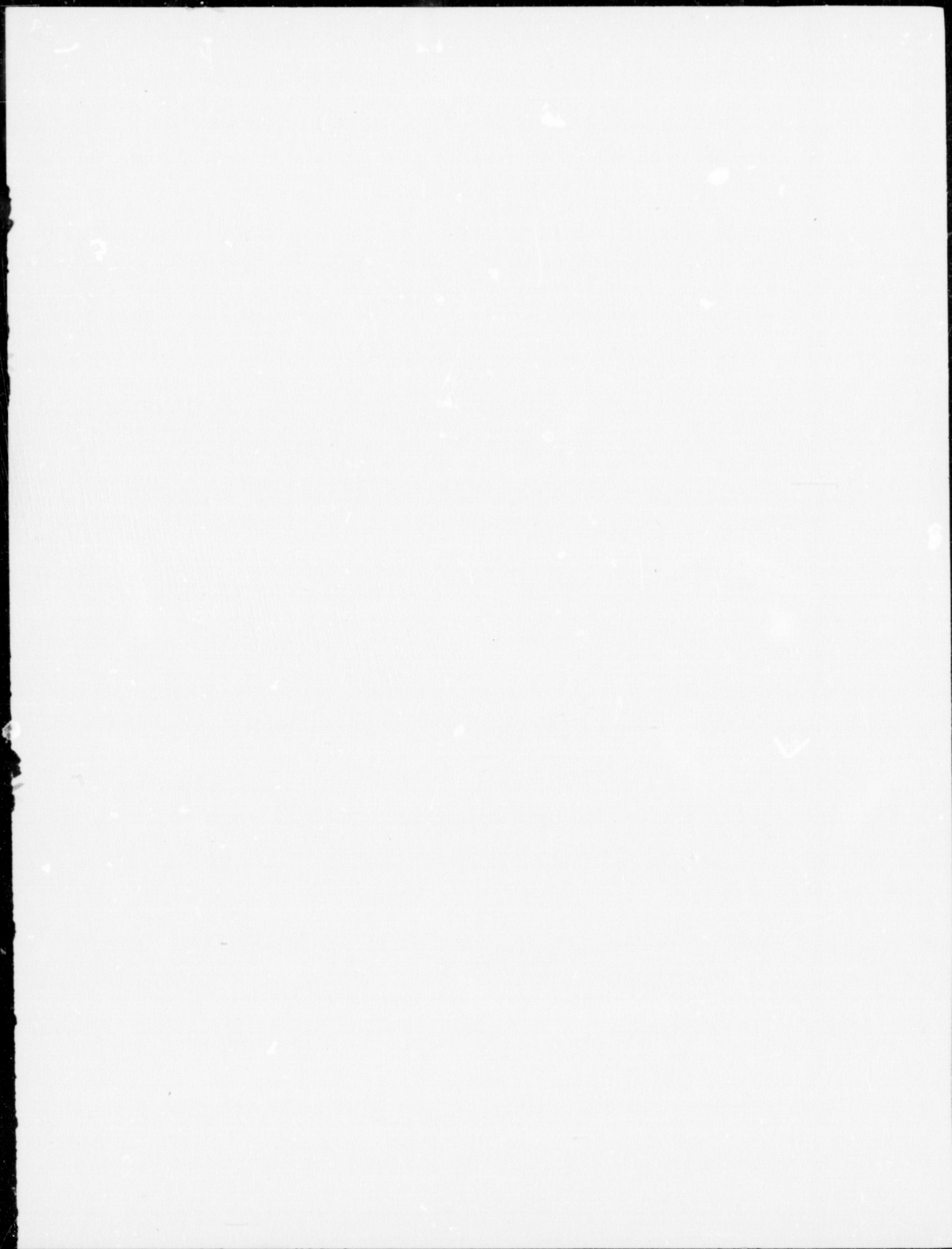
CONCLUSION

It is respectfully submitted that the verdict and judgments of conviction of the court below should be affirmed.

Respectfully submitted,

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